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IN THE

Supreme Court of the United States

October Term 1975

No. [redacted], 75-305

73-315
HEAVEN HILL DISTILLERIES, INC.,
Appellant,
vs.
JOSEPH NOVAK, Liquor Control Commissioner of Minnesota,
Appellee,
and
OLD PEORIA COMPANY, INC.,
Appellant,
vs.
JOSEPH NOVAK, Liquor Control Commissioner of Minnesota,
Appellee.

75-305
GRIGGS, COOPER & CO., INC.,
Intervenor-Appellant,
vs.
JOSEPH NOVAK, Liquor Control Commissioner of Minnesota, and the STATE OF MINNESOTA,
Defendants-Respondents.

MOTION TO DISMISS OR AFFIRM

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TABLE OF CONTENTS

	PAGE
CITATION TO OPINION BELOW	2
QUESTION PRESENTED	2
I. Statement	2
II. Argument	5
A. Introduction	5
B. The Act Does Not Violate Due Process of Law	8
1. Chapter 664 Neither Creates an Impermissible "Conclusive Presumption" Nor Is It Overbroad in Operation	8
2. The Act Is Not an Impermissible Interference With Any "Property" or "Liberty" Rights	11
3. Other Due Process Claims	14
C. Chapter 664 Is Not Violative of the Equal Protection Clause	15
1. The Exclusion of Wines and Malt Beverages From the Operation of Chapter 664 Is Wholly Proper	15
2. The So-called "Private "Brand" Distinction	17
D. Summary	18
CONCLUSION	18

TABLE OF STATUTES AND CONSTITUTIONAL PROVISIONS CITED

PAGE

United States Constitution:

U.S. Const. Amend. XXI 5, 6

U.S. Const. Amend. XII, § 2 6

Minnesota Statutes:

Minn. Stat. § 325.04 (1974) 14

Minn. Stat. § 340.13, subd. 13 (1974) 12

Minn. Stat. § 340.141 (1974) 14

Minn. Stat. § 340.142 (1974) 14

Minn. Stat. § 340.19 (1974) 14

Minn. Stat. § 340.984 (1971) 4

Minn. Laws 1969, ch. 119, § 5 4

Minn. Laws 1973, ch. 664 ..... *passim*

Minn. Laws 1973, ch. 664, subd. 1 (codified as Minn. Stat. § 340.114, subd. 1 (1974)) 3

Minn. Laws 1973, ch. 664, § 2 (codified as Minn. Stat. § 340.114 (1974) 2

Minn. Laws 1973, ch. 664, subd. 2(a) (codified as Minn. Stat. § 340.114, subd. 2(a) (1974)) 3

Minn. Laws 1973, ch. 664, subd. 4 (codified as Minn. Stat. § 340.114, subd. 4 (1974)) 3

United States Statutes:

42 U.S.C. § 2000(a), *et seq.* (1964) 9

Cases:

Advance-Rumely Thresher Co. v. Jackson, 287 U.S. 283 (1932) 13

American Federation of Labor v. American Sash & Door Co., 335 U.S. 538 (1949) 17

PAGE

Baxley v. Alabama Dairy Commission, 360 F. Supp. 1159 (M. D. Ala. 1973) 13

California v. LaRue, 409 U.S. 109 (1972) 6

Carter v. Commonwealth of Virginia, 321 U.S. 131 (1944) 7

Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974) 10

Day-Brite Lighting, Inc. v. State of Missouri, 342 U.S. 421 (1952) 13

Federal Distillers v. State, —— Minn. ——, 229 N.W.2d 144 (1975) 2, 8, 11, 14

Ferguson v. Skrupa, 372 U.S. 726 (1963) 13, 16

George Benz Sons, Inc. v. Ericson, 227 Minn. 1, 34 N.W.2d 725 (1948) 12

Giozza v. Tiernan, 148 U.S. 657 (1893) 12

Indianapolis Brewing Co. v. Liquor Control Commission, 305 U.S. 391 (1939) 7

Katzenbach v. McClung, 379 U.S. 294 (1964) 9, 10, 11

Keystone Collection Service Inc. v. Recio, 389 F. Supp. 164 (D.P.R. 1975) 13

Mahoney v. Joseph Triner Corp., 304 U.S. 401 (1938) 6, 7

Malito v. Marcin, 14 Ill. App. 3d 658, 303 N.E.2d 262 (1973), *appeal dismissed for want of a substantial federal question*, 417 U.S. 963 (1974) 12

Nebbia v. New York, 291 U.S. 502 (1934) 12, 13

North Dakota State Board of Pharmacy v. Snyder's Drug Stores, 414 U.S. 156 (1973) 13

Olsen v. State of Nebraska, 313 U.S. 236 (1941) 13

	PAGE
Paron v. City of Shakopee, 226 Minn. 222, 32 N.W.2d 603 (1948)	12
Roschen v. Ward, 279 U.S. 337 (1929)	16
Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35 (1966)	5, 6, 7, 14
Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608 (1935)	9, 10, 11, 16
State Board of Equalization v. Young's Market Co., 299 U.S. 59 (1936)	6, 7
Tigner v. State of Texas, 310 U.S. 141 (1940)	16
Twin City Candy & Tobacco Co., Inc. v. A. Weisman Co., 276 Minn. 225, 149 N.W.2d 698 (1967)	11
United States v. Carolene Products Co., 304 U.S. 144 (1938)	11
United States v. Darby, 312 U.S. 100 (1941)	9
United States v. Frankfort Distilleries, 324 U.S. 293 (1945)	6
United States Department of Agriculture v. Murray, 413 U.S. 508 (1973)	10
Vlandis v. Kline, 412 U.S. 441 (1973)	10
Wickard v. Filburn, 317 U.S. 111 (1942)	9
Williamson v. Lee Optical of Oklahoma, 348 U.S. 483 (1955)	16, 17
Rules of Court:	
United States Supreme Court Rule 16(1)	1

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MOTION TO DISMISS OR AFFIRM

Appellees respectfully move, pursuant to Rule 16(1) of the Rules of this Court, that the appeals herein be dismissed or, in the alternative, that the judgment of the Supreme Court of Minnesota be affirmed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to require further argument.

BRIEF IN SUPPORT OF MOTION

CITATION TO OPINION BELOW

Although the opinion of the Minnesota Supreme Court has not yet been officially reported in the *Minnesota Reports*, it is reported at 229 N.W.2d 144 (Minn. 1975).[1]

QUESTION PRESENTED

Is there a substantial federal question as to the validity of Minn. Laws 1973 Chapter 664, which was enacted by the Minnesota Legislature in the exercise of the State's police power and within its broad range of authority over the traffic and importation of intoxicating liquors into the State.

I.

STATEMENT

This is an appeal from the decision of the Minnesota Supreme Court upholding the constitutionality of Minn. Laws 1973 Chapter 664, § 2.[2] As its essence, the Act regulates the

[1] We note that appellants continuously refer to "two" opinions of the Minnesota Supreme Court. See, for example, Appendix Exhibits A and B of Appellant Griggs, Cooper & Co. (A-1 and A-26). Of course, only one opinion of the court, that dated May 2, 1975, is official and on appeal here, and it is a unanimous, *en banc* opinion which now incorporates the views of the *one* previously dissenting Minnesota Justice.

[2] Codified as Minn. Stat. § 340.114 (1974). Throughout this brief, that statute shall be referred to as "Chapter 664" or simply as the "Act." The text of the Act is set forth in the Combined Jurisdictional Statement of Appellants Heaven Hill Distilleries, Inc. and Old Peoria Company, Inc. (hereinafter referred to as "Heaven Hill Jurisdictional Statement") at 3-5 and the Jurisdictional Statement of Griggs, Cooper & Co., Inc. (hereinafter referred to as "Griggs, Cooper Jurisdictional Statement") at 3-4.

distribution of intoxicating liquors as they enter the State of Minnesota.[3] The Act applies *only* to licensed importers of intoxicating liquors[4] and establishes several requirements which they must meet in order to sell their products in the State of Minnesota. Insofar as pertinent here, the Act requires all licensed importers doing business in Minnesota to sell their product on an equal basis to all licensed Minnesota manufacturers and wholesalers.[5] It further provides that a licensed importer doing business in this State may refuse to sell to a manufacturer or wholesaler only if the prospective purchaser is in arrears in the payment of sums due to the importer refusing to make the requested sale.[6]

Several important facts concerning the Act and its adoption by the Minnesota Legislature should be noted here. It is initially important to underscore the practice of exclusive wholesale distributorship of intoxicating liquor which existed in Minnesota prior to the adoption of Chapter 664. Historically, each licensed out-of-state importer of intoxicating liquor[7] sold its brands to only one Minnesota wholesaler. Thus, a retailer which desired to sell a particular brand of liquor could obtain that brand from only one of the ten wholesalers[8] which

[3] Liquor is distributed in Minnesota according to the so-called "three-tier" system of distribution. That is, licensed out of state importers sell their products to licensed in-state Minnesota wholesalers, who in turn sell to retailers.

[4] The Act exempts wines and malt beverages from its coverage. Minn. Laws 1973 Chapter 664, subd. 4. (Minn. Stat. § 340.114, subd. 4 (1974).)

[5] Minn. Laws 1973 Chapter 664, subd. 1. (Minn. Stat. § 340.114, subd. 1 (1974).)

[6] Minn. Laws 1973 Chapter 664, subd. 2(a). (Minn. Stat. § 340.114, subd. 2(a) (1974).)

[7] There are approximately 150 persons or entities licensed to import intoxicating liquor into the State of Minnesota. Appendix to Griggs, Cooper Jurisdictional Statement at A-58.

[8] Prior to the enactment of Chapter 664, 10 wholesalers were actively engaged in the sale of intoxicating liquor. Two additional wholesalers are now licensed, but not actively doing business pending the outcome of this litigation.

were licensed to do business in the State of Minnesota. The natural effect of this scheme of exclusive wholesale distribution was the complete foreclosure of any *intrabrand* competition among wholesalers.

As the Minnesota Supreme Court pointed out in the opinion below, the enactment of Chapter 664 is the Legislature's second attempt to prohibit the exclusive wholesale distribution of intoxicating liquor. The first legislative effort to do so occurred in 1969 with the passage of Minn. Stat. § 340.984 (1971).[9] That statute was designed to establish intrabrand competition by prohibiting the then common practice of establishing a scheme of exclusive wholesale distribution through agreements between wholesalers and importers. That statute was unsuccessful in meeting its objective, since the licensed importers and wholesalers continued *sans* formal agreement the very practice which the 1969 Legislature had in effect determined to be inimical to the public policy.

Thus, wholesalers and importers of intoxicating liquors continued to maintain their scheme of exclusive wholesale distribution of intoxicating liquor. Minnesota consumers continued to be deprived of the benefits of intrabrand competition as a result of the brand monopolies which arose from that exclusive distribution system. The Minnesota Legislature responded to these economic evils in the State's intoxicating liquor industry by enacting Chapter 664.

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[9] Minn. Laws 1969, ch. 1119, § 5. This enactment, which was repealed by the Act under challenge here, provided:

> It shall be unlawful for any wholesaler to enter into an agreement with a manufacturer by the terms of which the manufacturer is prohibited from supplying intoxicating liquor to any other wholesaler within the state. Any such agreement, whether entered into before or after June 7, 1969, is hereby declared to be contrary to public policy and void. In addition, the entering into of any agreement prohibited by Laws 1969, Chapter 1119 after the effective date of enactment shall constitute grounds for revocation of a wholesalers license.

II.

ARGUMENT

Here and in the state courts below, appellants have attacked Chapter 664 on almost every conceivable constitutional ground. Their arguments, however, are either plainly unmeritorious or raise no issue which has not been put to rest by this Court. Plenary consideration of this appeal is unwarranted in light of the unsubstantiality of the issues raised by appellants.

A. INTRODUCTION.

Although appellants have attempted to do so, the importance of the Twenty-first Amendment to the United States Constitution to the issues in this appeal cannot be ignored. "Consideration of any state law regulating intoxicating beverages must begin with the Twenty-first Amendment. . . ." *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 41 (1966). The plain language of the Twenty-first Amendment and relevant decisions of this Court establish the transparent nature of appellants' arguments and dictate that this motion should be granted.

The Twenty-first Amendment reserves to the states broad powers over the regulation of intoxicating liquor. It provides in pertinent part that:

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

U. S. Const. Amend. XXI, § 2. This Court has often recognized ". . . the state's full authority to determine the conditions upon which liquor can come into its territory and what will be done with it after it gets there. . . ." *United States v. Frankfort Distilleries*, 324 U.S. 293, 299 (1945). *See e.g., California v. LaRue*, 409 U.S. 109 (1972); *Joseph E. Seagram & Sons v. Hostetter, supra; Mahoney v. Joseph Triner Corp.*, 304 U.S. 401 (1938); *State Board of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936). Indeed, the Court has acknowledged that the Twenty-first Amendment broadens the scope of a state's police power over intoxicating liquor and is the source of an added presumption as to the validity of state laws regulating the liquor traffic. *California v. LaRue, supra.*

In this case, the Court is faced with a challenge to a statute which is an admitted exercise of the police power of the State of Minnesota—regulation of liquor distribution at the time of entry of the product into the State in furtherance of the economic well-being of its citizens—and which regulates the liquor industry as a commercial enterprise. Contrary to the assertions of appellants, Chapter 664 is not a regulation of important *individual* rights in the guise of liquor regulation; it relates solely to economic issues and it operates squarely within the realm preserved for the states by the Twenty-first Amendment. In short, it sets restrictions upon the importation of liquor into the State, precisely as contemplated by the Twenty-first Amendment.

The arguments which appellants make in justification of their disregard of the relevance to this appeal of the Twenty-first Amendment are without substance. First, the fact that Chapter 664 is not a "temperance" measure is of no moment. This Court has expressly recognized that:

> . . . nothing in the Twenty-first Amendment or any other part of the Constitution requires that state laws regulating the liquor business be motivated exclusively by a desire to promote temperance.

Joseph E. Seagram & Sons, Inc. v. Hostetter, supra, 384 U.S. at 47. *See also, State Board of Equalization v. Young's Market Co., supra*, 299 U.S. at 63.[10] Second, as previously noted, the Act is not a guise whereby the State is seeking to regulate conduct other than the distribution of intoxicating liquor. Third, as in all other areas of state economic regulation, this Court long ago made clear that it will not make inquiry into the "reasonableness" or "wisdom" of State statutes regulating intoxicating liquor. *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 46-47 (1966); *Mahoney v. Joseph Triner Corporation*, 304 U.S. 401, 404 (1938). *See also, Carter v. Commonwealth of Virginia*, 321 U.S. 131, 142 (1944) (Mr. Justice Frankfurter, concurring).

Chapter 664 draws constitutional vitality and support from the Twenty-first Amendment and the prior decisions of this Court. And while it is apparent from those decisions that there can exist no serious question as to the validity of that statute, it is also clear that analysis of the arguments raised by appellants (undertaken, as it should be, in the light of the foregoing constitutional principles) leads ineluctably to the conclusion that no substantial questions are presented in this appeal.

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[10] We suggest that the decisions of the Court in Indianapolis Brewing Co. v. Liquor Control Commission, 305 U.S. 391 (1939) and Joseph S. Finch & Co. v. McKittrick, 305 U.S. 395 (1939) also indicate that the Twenty-first Amendment does not require that state regulation of intoxicants be geared to the promotion of temperance. In both cases, this Court upheld state statutes designed to retaliate against states which discriminated against locally-produced intoxicating beverages.

B. THE ACT DOES NOT VIOLATE DUE PROCESS OF LAW.

1. Chapter 664 Neither Creates an Impermissible "Conclusive Presumption" Nor Is It Overbroad in Operation.

In two closely related, if not entirely overlapping arguments, appellants contend that by limiting the circumstances in which an importer may refuse to sell its product to the single instance where a wholesaler or manufacturer is in arrears on payments due that importer, the legislature has enacted a statute which is overbroad in scope and which creates a "conclusive presumption" that all other "refusals to deal" are grounded in anticompetitive motives.[11] These arguments fail for at least two reasons.

Initially, we must admit to some difficulty in ascertaining any "presumption" in the Act. Chapter 664 obviously regulates the *importation of liquor into Minnesota* and establishes the State's policy regarding the distribution of intoxicating liquor. As such, it sets certain conditions which must be met by those who import intoxicating liquor into the State. The Act does not "presume" anything; instead, it precludes certain conduct entirely and it merely defines what is expected of licensed importers doing business in the State of Minnesota.[12]

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[11] Heaven Hill Jurisdictional Statement at 30-42; Griggs, Cooper Jurisdictional Statement at 14-20.

[12] We note here that the Minnesota Supreme Court did not decide that Chapter 664 creates any presumption. Rather, the Court considered appellants' arguments on that point *on the assumption* that a presumption was intended by the statute. *See,* Federal Distillers v. State, —— Minn. ——, 229 N.W.2d 144, 158 (1975); Appendix to Griggs, Cooper Jurisdictional Statement at A-47. In this regard, Appellants' arguments are identical to those of an individual challenging the legality of any mile-per-hour speed limit on the grounds that he conceivably may travel at greater speeds without intending to endanger the public or waste fuel and therefore the law establishing that speed limit creates an impermissible conclusive presumption as to those or other hypothetical factors.

More importantly, appellants' "presumption" and overbreadth arguments are simply incorrect. This Court has often stated the rule that a legislative body is ". . . entitled to recognize the general effects of a practice and forbid it by general rule, even though the generality may not be true in all particulars." *Semler v. Oregon State Board of Dental Examiners,* 294 U.S. 608, 613 (1935). *See also, Katzenbach v. McClung,* 379 U.S. 294 (1964); *Wickard v. Filburn,* 317 U.S. 111 (1942); *United States v. Darby,* 312 U.S. 100 (1941). In this case, the Minnesota Legislature determined that the general effect of the practice of exclusive liquor wholesaling was detrimental to a desirable public goal—intrabrand competition among wholesalers.

Thus, even assuming that single incidents of refusals to sell would not be deleterious to such competition (a questionable assumption given the small number of concerns licensed to wholesale liquor in Minnesota) or that an importer may not intend to reduce competition by particular refusals to sell, the Minnesota Legislature was fully justified in enacting the "sell-to-all" provisions of Chapter 664. Indeed, that conclusion follows from the holding of this Court in *Katzenbach v. McClung, supra.* There, in a challenge to the 1964 Civil Rights Act (42 U.S.C. §2000(a), *et seq.*) as it applied to a small Georgia restaurant, it was argued that:

> . . . Congress has arbitrarily created a conclusive presumption that all restaurants meeting the criteria set out in the act "affect commerce." Stated another way, they object to the omission of a provision for a case-by-case

> determination—judicial or administrative—that racial discrimination in a particular restaurant affects commerce.

Katzenbach v. McClung, supra, 379 U.S. at 302-303. This Court rejected that argument, concluding that there was a rational basis for the Congressional judgment:

> . . . Congress has determined for itself that refusals of service to Negroes have imposed burdens both upon the interstate flow of food and upon the movement of products generally. Of course, the mere fact that Congress has said when particular activity shall be deemed to affect commerce does not preclude further examination by this Court. *But where we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary for the protection of commerce, our investigation is at an end.*

Id. at 303-304 (emphasis added).

It is clear that the Minnesota Legislature acted rationally in establishing and taking steps to preserve intraband competition at the wholesale level by requiring importers to sell to all creditworthy wholesalers. The decisions of this Court in *McClung, Semler,* and the other cases cited above sustain the validity of the course of action chosen by the legislature to effectuate the legitimate State policy defined in Chapter 664.

The authorities upon which appellants rely [13] for their argument that Chapter 664 creates an impermissible conclusive presumption are inapposite here. Those cases are distinguishable because each dealt with situations wherein important *individual* rights were decided on the basis of a presumed fact of low probable accuracy. The present regulatory scheme, like that involved in *Katzenbach v. McClung, supra,* and *Semler v. Oregon State Board of Dental Examiners, supra,* concerns economic affairs and therefore is valid since it is rationally based. *See, United States v. Carolene Products Co.,* 304 U.S. 144 (1938).

Likewise, appellants have cited no persuasive authority in support of their overbreadth argument. It appears, in fact, that they rely almost entirely upon the decision of the Minnesota Supreme Court in *Twin City Candy & Tobacco Co., Inc. v. A. Weisman Co.,* 276 Minn. 225, 149 N.W.2d 698 (1967), a decision which that same court expressly held to be inapplicable to this case.[14]

2. The Act Is Not an Impermissible Interference With Any "Property" or "Liberty" Rights.

Appellants have also asserted that Chapter 664 destroys without due process of law a claimed "vested property right" in the continuation of their businesses and violates a claimed "liberty" to refuse to deal with those not of their choosing. Neither argument has merit.

The appellant-wholesalers' claim of a vested right to continue in the liquor business is not only contrary to the law of

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[13] They rely primarily on the decisions of the Court in Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974) and Vlandis v. Kline, 412 U.S. 441 (1974).

In addition to what has been said above, it is clear that the Court's regard of the seriousness of the questions raised by an irrebuttable presumption is in direct proportion to the importance of the *individual* right affected. *See,* United States Department of Agriculture v. Murry, 413 U.S. 508, 517-518 (1973) (Mr. Justice Marshall, concurring); Vlandis v. Kline, 412 U.S. 441, 459 (1973) (Mr. Justice White, concurring).

[14] Federal Distillers, Inc. v. State, —— Minn. ——, 229 N.W.2d 144, 159 (1975); Appendix to Griggs, Cooper Jurisdictional Statement at A-49.

this State,[15] but is singularly unconvincing in the fact that *Chapter 664 does not require them to do anything.* The Act gives all wholesalers the right to purchase all brands of liquor imported into Minnesota; it does not require them to make such purchases; it does not require them to alter marketing practices; it does not require them to purchase products from new sources; it does not require them to discharge salesmen. In short, the Act does not require any change in any wholesaler's pre-existing business practice.[16]

The claim that Chapter 664 unconstitutionally infringes a right to "refuse to deal" is also without merit.[17] It has long been settled that such a right is not immune from the police power of the state. *See, Nebbia v. New York,* 291 U.S. 502,

[15] *See,* George Benz Sons, Inc. v. Ericson, 227 Minn. 1, 34 N.W.2d 725 (1948); Paron v. City of Shakopee, 226 Minn. 222, 32 N.W.2d 603 (1948). *See generally,* Giozza v. Tiernan, 148 U.S. 657 (1893); Malito v. Marcin, 14 Ill. App. 3d 658, 303 N.E.2d 262 (1973), *appeal dismissed for want of a substantial federal question,* 417 U.S. 963 (1974).

In this regard, Minn. Stat. § 340.13, subd. 13 (1974), plainly sets forth the State's policy regarding the trade in intoxicating liquor:

> The legislature expressly reserves the right to limit or diminish the number of licenses, to limit the profits of any authorized manufacturer, wholesaler, or retailer as a condition to granting or continuing a license, and to regulate, limit, or prohibit the issuance or sale of capital stock in any licensee as a condition to granting a license.

[16] Thus, although not expressly challenged herein, the standing of the wholesaler-appellants to raise federal constitutional issues is highly questionable. That party which most clearly had standing, National Distillers & Chemical Corporation, an importer, has dismissed its appeal herein. In this same regard, the Act does not *require* importers to offer their products to Minnesota wholesalers. Thus, there is no merit to the assertion that Chapter 664 creates "compulsory franchises."

[17] It is important to note here, as we have done throughout these proceedings, that none of the appellant-wholesalers have standing to assert this claim. Chapter 664 does not affect the ability of wholesalers to choose the suppliers with which they deal. The Act merely requires that licensed *importers* offer their products for sale equally to all wholesalers.

523 (1934); *Advance-Rumely Thresher Co. v. Jackson,* 287 U.S. 283, 288 (1932).[18]

In essence, both of the above-discussed arguments (as well as many of the others raised by appellants) are invitations to the Court to resurrect the doctrine of substantive due process in the area of state economic regulation and thereby ". . . re-enter a constitutional thicket abandoned by the federal courts over three decades ago. . . ." *Baxley v. Alabama Dairy Commission,* 360 F. Supp. 1159, 1161 (M.D. Ala. 1973) (three-judge court). This invitation is made notwithstanding the Court's repeated admonitions that it does not sit in review of the economic wisdom or utility of state laws and that the economic policy of a particular state is a matter to be determined by its legislature. *See e.g., North Dakota State Board of Pharmacy v. Snyder's Drug Stores,* 414 U.S. 156 (1973); *Ferguson v. Skrupa,* 372 U.S. 726 (1963); *Day-Brite Lighting, Inc. v. State of Missouri,* 342 U.S. 421 (1952); *Olsen v. State of Nebraska,* 313 U.S. 236 (1941). These principles, thoroughly ignored by appellants, further establish the unsubstantiality of their due process arguments.[19]

[18] Appellants' reliance upon antitrust theories in opposition to the legality of Chapter 664 is clearly misplaced. The Act does not depend for its validity on any pre-existing law. It is a police measure to be judged on its own merit. Were the business practices the Act is designed to prevent violations of pre-existing law, enactment of the Act would have been unnecessary.

[19] Keystone Collection Service Inc. v. Recio, 389 F. Supp. 164 (D.P.R. 1975) is illustrative of the modern law of substantive economic due process. There, plaintiffs challenged the Puerto Rican "Christmas Bonus Law" which required employers to provide qualified employees with a yearly bonus based on a percentage of salary (subject, however, to a specified monetary limit). The statute was challenged on due process grounds and the district court was requested to convene a three-judge tribunal. The court, however, refused and dismissed the complaint, holding that no substantial federal question as to the validity of the statute had been presented.

3. Other Due Process Claims.

Appellants assert that the interpretation given Chapter 664 by the Minnesota Supreme Court has rendered the Act unconstitutionally vague.[20] It is further argued by two of the appellants herein that the decision below constitutes an unlawful delegation to the Minnesota Liquor Control Commission of the power to define standards of criminal conduct.[21]

These arguments are apparently based upon a single footnote[22] to the Court's opinion which merely states the truism that even though the Act is constitutional on its face, it cannot be improperly applied through invalid regulations.[23] That admonition did create any new "exceptions" to the Act's provisions. It is obvious that the court's footnoted comments regarding "irrebuttable presumptions" were in answer to appellants' various arguments that beneficient motives may underlie a particular refusal to sell to a wholesaler. The court pointed out that many, if not all, of the alleged "justifications" forwarded by appellants were independent violations of law and cause for the removal of a wholesaler's license.[24]

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[20] As appellants note, violations of the Act are subject to criminal sanctions. Minn. Stat. § 340.19 (1974).

[21] Heaven Hill Jurisdictional Statement at 50.

[22] Federal Distillers, Inc. v. State, —— Minn. ——, 229 N.W.2d 144, n. 20 at 160; Appendix to Griggs, Cooper Jurisdictional Statement at A-50.

[23] Since enforcement of the Act was stayed through the time of the Minnesota Supreme Court decision, the Court was passing only upon its facial constitutionality. *Cf.* Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35, 41 (1966). As of this date, the Liquor Control Commissioner has not yet issued any regulations pursuant to Chapter 664.

[24] *See e.g.*, Minn. Stat. § 325.04 (1974) (prohibiting sales below cost with intent to injure competitor or destroy competition); Minn. Stat. § 340.141 (1974) (prohibiting the sale of refilled liquor bottles); Minn. Stat. § 340.142 (1974) (prohibiting dilution or other tampering with the contents of an original liquor bottle or package).

In sum, there is no merit to the argument that appellants are forced to "guess" at what conduct is expected of them as a result of the provisions of Chapter 664. The decision of the Minnesota Supreme Court holding the Act to be constitutional on its face simply does not place appellants in the position of ignorance which they have contrived for this Court.

C. CHAPTER 664 IS NOT VIOLATIVE OF THE EQUAL PROTECTION CLAUSE.

Appellants make two arguments in support of the contention that Chapter 664 denies them equal protection of the laws. First, they assert that the exclusion of wine and malt beverages from the Act's reach amounts to a denial of equal protection. Second, they claim that owners of "private labels" are placed in a preferred position under Chapter 664, also in violation of the Equal Protection Clause. Neither argument presents a substantial federal question to the Court.

1. The Exclusion of Wines and Malt Beverages From the Operation of Chapter 664 Is Wholly Proper.

This Court has enunciated specific guidelines to be applied in determining the validity under the Equal Protection Clause of a particular legislative classification. When applied to the present case, those principles establish the validity of the legislative distinction between wines and malt beverages on the one hand and intoxicating liquors on the other.

It is clear that legislative bodies are not required by the Equal Protection Clause to address either all or none of the problems in a particular area.

The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the

> same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. [Citation omitted.] Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. [Citation omitted.] The legislature may select one phase of one field and apply a remedy there, neglecting the others. [Citation omitted.]

Williamson v. Lee Optical of Oklahoma, 348 U.S. 483, 489 (1955). *See also, Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608 (1935). In addition, "[a] statute is not invalid under the Constitution because it might have gone farther than it did. . . ." *Roschen v. Ward*, 279 U.S. 337, 339 (1929). Finally, in areas of economic regulation, the Equal Protection Clause prohibits only invidious discrimination, *Ferguson v. Skrupa*, 372 U.S. 726 (1963), and accordingly, does not require things which are different in fact or opinion to be treated in like manner. *Tigner v. State of Texas*, 310 U.S. 141 (1940).

In light of the foregoing, the legislative distinction between intoxicating liquor and wine and malt beverages is clearly valid. There are approximately 210 wholesale beer distributors in Minnesota,[25] 23 wholesalers which deal in wine (which includes each of the appellant-wholesalers herein),[26] and only 10 active wholesalers which distribute distilled spirits. Plainly, it was not only permissible but eminently reasonable for the legislature first to establish a competitive atmosphere within the aspect of the wholesale liquor industry wherein the

[25] Appendix to Griggs, Cooper Jurisdictional Statement at A-58.
[26] *Id.* at A-58. Each of the ten licensed wholesalers doing business prior to the enactment of the Act are licensed to wholesale wine as well as distilled spirits.

competitive problem was most acute. Thus, the distilled spirits market, having the least number of wholesalers and therefore the greatest potentiality for competitive abuse, was the logical first step in regulation.

The Minnesota Legislature was not required to take more than the "first step" it did by the enactment of Chapter 664. *Williamson v. Lee Optical of Oklahoma, supra; American Federation of Labor v. American Sash & Door Co.*, 335 U.S. 538, 541-542 (1949). It is plain that the classification of which appellants complain is a rational one, well within the permissible sphere of legislative definition.

2. The So-Called "Private Brand" Distinction.

One of the appellants asserts that the Act is deficient under the Equal Protection Clause because, in its view, the Act places Minnesota wholesalers which distribute "private-brand" liquor in a favored position *vis a vis* wholesalers which do not own private labels.[27] That argument was not even reached by the Minnesota Supreme Court and, in any event, has no merit.

Appellees have never asserted, nor did the court below hold, that private brands as such are exempt from the Act. It is clear under the Act that all *liquor* sold by an importer to one Minnesota wholesaler must be sold to all licensed wholesalers. In the case where the importer labels liquor with a brand label owned by a wholesaler, the importer can hardly be forced to sell the *label* to the other wholesalers—since it is not his to sell. However, the *product* contained in *unlabeled* bottles—which is his—must be sold to all other wholesalers, who are free to develop their own line of labels. Thus, *all* wholesalers are treated equally under Chapter 664 and the "private label" question raises no doubt whatever of the Act's validity.

[27] Griggs, Cooper Jurisdictional Statement at 27.

D. SUMMARY.

Chapter 664 is a valid police regulation over the importation of intoxicating liquor into the State of Minnesota. It was enacted to correct a situation determined by the legislature to be inimical to the public welfare and legitimate means were chosen to accomplish the legislative goal. At base, this appeal is merely a disguised challenge to the economic policies adopted by the legislature and the arguments appellants have presented are more appropriately addressed to that body. In light of the Court's prior decisions, no substantial federal question has been raised by this appeal and plenary consideration of this matter is unnecessary.

CONCLUSION

For the reasons set forth herein, this Court should grant appellees' motion to dismiss this appeal or, in the alternative, affirm the decision of the Minnesota Supreme Court.

Respectfully submitted,

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